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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF ANAHEIM,
Petitioner,

vs.

CALIFORNIA CREDIT UNION LEAGUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

MOSES W. JOHNSON, IV
Counsel of Record

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM

200 South Anaheim Boulevard, Suite 356
Anaheim, California 92805
(714) 254-5169

Counsel for Petitioner
CITY OF ANAHEIM

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CITY OF ANAHEIM

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PETITIONERS REPLY BRIEF

I

CORRECTIONS OF MISSTATEMENTS IN THE OPPOSITION

Respondent argues that employees of federal credit unions on credit union business stand in the shoes of their federal credit union employers and therefore the levy of a TOT tax on those employees violates 12 U.S.C. § 1768. (Opposition at 3.) However, where an employee pays for the hotel room with a private check, brings his or her nonemployee spouse as a "guest," or the employee and his nonemployee "guest" spouse and family spend an extra weekend to visit Disneyland, it is questionable whether the employee "stands in the shoes of the federal government" or a federal credit union. Respondent concedes that the Ninth Circuit decision does *not* involve guests of a federal instrumentality, it involves employees. (Opposition at 19.) Respondent thus concedes that nonemployee guests are taxable. It is curious out of all the hotels in Anaheim that Respondent held its conference at the Disneyland Hotel. Respondent does not wish to deal with these hard questions that the City is faced with everyday. Respondent conceded at oral argument before the district court: "We haven't even asked for a declaratory judgment in a reimbursement situation. Because giving the City the benefit of the doubt, we think that might be difficult to track." (Petition Appendix F at 7.) Respondent thus concedes

that in the personal funds situations, the City can tax an employee even if he or she is on business.

Respondent argues that the City seeks an advisory opinion of this Court regarding the above questions in violation of Article III of the Constitution. (Opposition at 20.) This is not true. These questions were raised in the City's papers and oral argument at both the district court and Ninth Circuit's hearings. These questions all relate to whether the employee stands in the government shoes, the issue addressed by the Ninth Circuit opinion.

At the district court hearing, the City's primary objection to the court's ruling was legal, not practical, as claimed by Respondent. (Opposition at 3.) The City's main argument was as follows: ". . . But going to the merits, I would only say that all of the cases that I have cited to the court that dealt with transient occupancy tax, even though it dealt in situations where the employee was on some form of government business, all of those cases held that the tax was on the occupant of the room . . . . [A]ll of the cases that dealt specifically with the transient occupancy tax . . . have held that the tax fell upon the occupant, even when the employee was acting on behalf of the employer, acting on government business. It is the question of whether the legal incident falls, and in those cases they all found it fell on the employee." (Petition Appendix F at 6-7.)

As the United States pointed out in its amicus brief "[t]he City does not dispute that a federal credit union is an instrumentality of the United States . . . . [and] [t]he issue to be resolved here concerns the scope and effect of the Federal . . . constitutional immunity from local taxation . . . ." Brief for the United States as Amicus Curiae on behalf of the Appellee, 3-4. Even the Ninth Circuit recognized the constitutional question raised by this case: "[C]ourts have considered the immunity

afforded by Section 1768 to be coterminous with that afforded by the supremacy clause . . ." (Petition Appendix A at 3.)

Respondent also argues that the Ninth Circuit merely held that when doing the business of the government, government employees stand in the place of the government and thus cannot be taxed. (Opposition at 9.) In *Comptroller v. World Inns* (Md. 1987) 310 Md. 154, 163 n.4, 528 A.2d 477, 481 n.4, the court held that federal employees are not federal agencies or instrumentalities when contracting for the rental of hotel rooms and are subject to state sales tax, citing this Court's decision in *United States v. County of Fresno* (1977) 429 U.S. 452 at 464, 97 S.Ct. 699 at 705, 50 L.Ed.2d 683 at 693, as supporting this position. It is questionable when an employee is sleeping in a hotel bed or eating dinner in the hotel restaurant that he or she is doing the business of the federal government. The outpatients of the NIH were doing the "business" of the NIH but the Fourth Circuit upheld the TOT tax under the following facts: "[T]he National Institutes of Health, if not an arm at least a finger of the United States Government, since 1971 have instituted a policy of providing sleeping accommodations to outpatients under one or more of the programs conducted by the National Institutes. The patients have come to Bethesda, Maryland or its environs for treatment, the elapsed periods of their stays in hotels and motels in the area lasting no more than seven consecutive days. The NIH arranged with a private hostelry, United Inn of America, as an independent contractor, to supply accommodations, with NIH undertaking to meet room costs." *United States v. Montgomery County*, 761 F.2d 998, 999 (4th Cir. 1985).

II.

THE NINTH CIRCUIT DECISION CONFLICTS WITH THE FOURTH CIRCUIT COURT OF APPEALS DECISION IN *MONTGOMERY COUNTY*

The City denies Respondent's claim that it values collecting revenue over complying with 28 U.S.C. § 1768. (Opposition at 11.) The City's position is that stated in *Montgomery County*, 761 F.2d at 1002: "Of course, taxation is an eminently practical matter, and, if the host wants to volunteer to pay the tax, the entity imposing it, here, Montgomery County, is not going to object if the hotelier, serving as the statutory tax-collector, in handing over the correct sum due the County, 'erred' slightly as a formal matter by taking the money from the 'wrong' source."

In this case, the federal credit union employees must pay the TOT tax out of their own personal resources. "As long as a state makes no claim of right to collection from the federal government or its instrumentalities, a state may impose a tax." 75 Ops.Cal.Atty.Gen. 86, 89 (1992) quoting *Keystone Auto Leasing, Inc. v. Norberg* (R.I. 1985) 486 A.2d 613, 615. The City makes no claim of right to collect for the federal credit unions or the federal government, only the employees personally. These employees, however, are federal credit union employees rather than "an arm of the Government." *United States v. New Mexico* (1982) 455 U.S. 720 at 736-37, 102 S.Ct. 1373 at 1384. The legal incidence of the TOT tax thus falls upon federal credit union employees, not upon the federal credit union or federal government directly. Consequently, because the City's

Ordinance does not tax the federal credit unions or federal government directly, the City may apply the tax to federal credit union employees without violating the Supremacy Clause.

The Respondent claims that the City is trying to get around the tax immunity by simply wording the tax ordinance such that it was the employee that was taxed. (Opposition at 12.) This plainly is not what the City intended. When the City enacted its ordinance, its "objective was obviously to tax transients." *Montgomery County*, 761 F.2d at 1001. That Court also stated:

> "There remains for disposition an argument fashioned on the amendment in 1984 of the statute to restate the definition of 'transient' to read: 'Any person who for any period of not more than seven consecutive days actually occupies sleeping accommodations, in any hotel or motel providing sleeping accommodations for which a charge is made.' The definition for a person was revised to: 'A human being.' The NIH readily concede that, from and after the effective date of the 1984 legislation, the tax was due from the room occupants and any arrangement made by the National Institutes to reimburse them would be altogether collateral, not invalidating the power to assess the tax against the room occupant . . . ." *Montgomery County*, 761 F.2d at 1002.

The Respondent argues that the City fails to establish any of the criteria set forth in Rule 10 of the Supreme

Court Rules demonstrating a need for Supreme Court review. (Opposition at 12 n.6.) However, Respondent "agrees with Anaheim that the Ninth Circuit addresses an important taxation issue." (Opposition at 21.) Rule 10, Rules of the Supreme Court states the following reasons are considered by the Court: "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter .... (c) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Ninth Circuit's decision conflicts with *Montgomery County*, 761 F.2d 998, the only federal appellate case to consider TOT taxes.

This important question of federal taxation law affects whether all federal credit union and federal employees can stay in hotels in any city throughout the country without paying a TOT tax while they are on business. It is estimated that a total of approximately $100,000 will be lost annually to the City of Anaheim in TOT tax revenue if the Ninth Circuit decision stands. This case involves a question of exceptional national importance for all cities that depend on this revenue to fund vital local services like police and fire protection. When an employee is robbed in the hotel parking lot, it is the employee, not the employer, who calls the city police department requesting assistance. Even Respondent admits that this is "an era of shrinking public funds . . ." (Opposition at 10.) All cities need revenue for the economic burdens placed on them by transients visiting their cities.

Respondent argues that the decision in *Montgomery County* does not render a holding concerning employees

of a federal instrumentality. (Opposition at 18.) This is just plain wrong and ignores the crucial issue in this case. The TOT tax itself is levied on the 'transient' and "exactly who that has been being the crux of the case." *Montgomery County*, 761 F.2d at 999 n.2. That Court dealt with the issue of "employees" and held that "[t]he outpatients have come and gone in a fashion amply fitting description as transients .... the United States Government which arranges a room ... which is occupied only a day or two at a time by any one visiting *employee* or guest simply does not meet the definition of 'transient.' " *Montgomery County*, 761 F.2d at 1001 (emphasis added). The Fourth Circuit also considered the relevant decisions of this Court in rendering its main holding. "Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the United States or one of its agencies does not invalidate it under the supremacy clause. E.g., *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982); *Alabama v. King and Boozer*, 314 U.S. 1, 8-9, 62 S.Ct. 43, 45, 86 L.Ed. 3 (1941)." *Montgomery County*, 761 F.2d at 1002. The Ninth Circuit's decision fails to even mention or apply the precedent established by the Fourth Circuit.

Thus, Respondent's claim that the City has constructed a semantic fiction that it taxes the "employees" of the federal credit union while they are conducting the credit union's business to justify its TOT tax, (Opposition at 14), falls in the face of the above holdings by the Fourth Circuit. The City has always relied on the legal fiction that "the tax falls on the transient, the occupant of the sleeping accommodations." *Montgomery County*, 761 F.2d at 1002. This legal fiction is no less important than the Respondent's legal fiction that "a federal credit union (like a corporation or

any other nonnatural person) can act *only* through its employees and agents" (Opposition at 11), or the Ninth Circuit's legal fiction that "federal employees are constituent parts of the United States, at least with respect to their professional duties." (Petition Appendix A at 5.)

The California Attorney General has stated: "A city may levy a transient occupancy tax upon a state employee who, while on state business, contracts for a hotel room and submits payment for the room with a state issued check." 75 Ops.Cal.Atty.Gen. 86, 89 (1992). The California Attorney General after considering the relevant decisions of this Court, including *United States v. County of Fresno* (1977) 429 U.S. 452, 464, 97 S.Ct. 699, 50 L.Ed.2d 683 and *United States v. New Mexico* (1982) 455 U.S. 720, 737, 102 S.Ct. 1373, 71 L.Ed.2d 580, rejected "the argument that the election by a governmental agency to advance the room rental charges incurred by its employees while on official business transmutes a local transient occupancy tax into a direct tax on the government. It is our view, the tax remains on the employee for 'the privilege of occupying a room.' " 75 Ops.Cal.Atty.Gen. 86, 88 (1992).

Federal employees are not federal agencies or instrumentalities. In *United States v. County of Fresno*, *supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, this Court held that the legal incidence of a state tax fell on a federal employee carrying out governmental business. Nevertheless, *Fresno* held that tax immunity was inappropriate. The *Fresno* Court ruled on the facts presented in that case:

> "The 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work

> for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service — causing it to reimburse its employees for the taxes legally owed by them." *United States v. County of Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693 (emphasis in original).

Even the Comptroller General's original opinion, 53 Comp.Gen. 69 (1973), which considered the Montgomery County hotel room rental tax (the same tax as in the *Montgomery County* case cited above), held the "transient" was the room occupant, and not the Government, and thus the Government was not taxed directly

CONCLUSION

This case presents a serious taxation issue concerning the constitutionality of TOT taxes invoked in thousands of hotels daily throughout California and the nation. Petitioner respectfully requests that this Court grant Certiorari to review the issue.

DATED: January 22, 1997.

Respectfully submitted,

MOSES W. JOHNSON, IV
Counsel of Record

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM

Counsel for Petitioner
CITY OF ANAHEIM